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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER

WANDALL W. COODY

AND

ALLEN BROWN

CO-PETITIONERS

VERSUS

STATE OF LOUISIANA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

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INTRODUCTION

Petitioners Wandall W. Coody and Allen Brown, through the undersigned counsel, request that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered on April 15, 1983, denying review of the opinion of Court of Appeal of the Second Circuit, in and for the State of Louisiana.

QUESTIONS PRESENTED FOR REVIEW

(I.) Whether a criminal defendant, after a judicial determination of an actual conflict of interest on the part of his chosen defense attorney, may knowingly and intelligently waive his right to counsel free of conflicting interests?

(II.) Whether the trial court may, in evaluating the potential or actual conflict of interest, subject defendants and their attorneys to cross-examination which is likely to invade the attorney-client privilege?

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REFERENCE TO OPINION BELOW

The decision of the Supreme Court of the State of Louisiana denying review of the opinion of the Court of Appeal for the Second Circuit is unreported at the time of preparation of this brief, but is numbered as 83-KK-0576 on the docket of the Supreme Court of the State of Louisiana. (La. April 15, 1983).

STATEMENT OF JURISDICTION

As more fully articulated in the factual statement of the case, petitioners are charged through separate bills of information with various criminal offenses relating to malfeasance in office. On or about November 22, 1982, the State filed documents in the trial court captioned "Request of Court to Insure Defendants' Constitutional Rights," alleging a conflict of interest due to the

joint representation of multiple defendants. On December 1, 1982, the trial court heard evidence in the matter and proceeded to personally address each defendant as to the waiver of conflict-free multiple representation, ultimately concluding that each defendant had personally waived his right to conflict-free multiple representation. The State of Louisiana applied for writs of certiorari to the Court of Appeal for the Second Circuit to review the ruling of the trial court. On January 17, 1983, the Court of Appeal for the Second Circuit granted the writ application for the limited purpose of directing the trial court to conduct a further hearing of the conflict question. See: State v. Wandall W. Coody and Allen Brown, No. 15,382 KW. Petitioners immediately filed timely notice of intent to seek writs of

certiorari or review to the Supreme Court of the State of Louisiana to review the ruling of the Court of Appeal for the Second Circuit. Following timely application for writs of certiorari or review, the Supreme Court of Louisiana on April 15, 1983, denied certiorari. Petitioners then notified both the Court of Appeal for the Second Circuit and the Supreme Court of the State of Louisiana of their intention to apply to this Honorable Court for a writ of certiorari. On or about May 2, 1983, the trial court issued an order staying the proceedings pending petitioners' application for writ of certiorari to this Court. Petitioners invoke the jurisdiction of this Honorable Court pursuant to Rule 17.1(c) of the rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., AMEND. VI, PROVIDES:

> IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

STATEMENT OF THE CASE

Sheriff Wandall W. Coody of Morehouse Parish is charged by three separate bills of information with malfeasance in office having to do with allegedly requiring inmates of the parish jail to perform maintenance work on a privately owned building. A fourth bill of information charges injuring public records by allegedly entering

on office financial records as expenses of the office items of cost incurred by the Sheriff in connection with the work performed on that privately owned building. A fifth bill of information charges theft in regard to the alleged use of employee salary raises to pay personal obligations. Defendant Allen Brown is separately charged by a two-count bill of information with malfeasance and injuring public records.[1]

---

[1]Brown was charged with defendant Coody in connection with an incident involving the alleged destruction of arrest records relating to the Reese brothers. While these charges against Brown are still outstanding, the State has attempted to prosecute Coody. Venue in the matter was transferred to Rapides Parish, where the ruling of the trial judge quashing the two-count information was upheld by the Court of Appeal for the Third Circuit on May 17, 1983. See: State of Louisiana v. Wandall W. Coody and Allen Brown, No. K82-726.

Defendant Allen Brown initially retained the undersigned counsel, Kidd, as his attorney in connection with the criminal charge against him. During the pendency of the criminal proceedings against Sheriff Coody in Rapides Parish, defendant Coody dismissed his previous counsel of record and retained the undersigned counsel to represent him in connection with all criminal charges pending against him. The undersigned counsel accepted representation of defendant Coody with the full knowledge and consent of defendant Brown, who waived his attorney-client privilege.

Prior to the preliminary examination in the charges pending against defendants in Morehouse Parish, the State filed a Request of Court to Insure Defendants' Constitutional Rights, which raised the possibility of conflict of interest

due to the joint representation of multiple defendants. On December 1, 1982, the Fourth Judicial District Court, the Honorable Robert T. Farr, heard evidence in the matter and personally addressed each defendant as to the possible conflict of interest created by joint representations. Specifically, the district court advised each defendant of the possible adverse consequences of multiple representation in view of the facts of the case, and obtained the waiver of each defendant of conflict-free representation. Subsequent to the hearing the district court issued a written finding of fact and opinion. The finding of fact and opinion concluded as follows:

> "(1) Heretofore, there have existed substantial differences between the three principals as to both factual accounts and subjective analysis of motivation and intent (if not culpability), as

well as disagreements as to responsibilities and authority. Therefore, there have existed both actual and potential conflicts of interest among them, and their joint counsel have been attempting to represent conflicting interests.

(2) After participating in the discussions with counsel before the hearing on December 1 (as represented to the Court during the hearing), they sought to resolve those conflicts by agreement and common approach under the guidance of joint counsel and apparently believed that they had achieved their purpose.

(3) However, after being interrogated and instructed by the Court in the hearing, and after conferring with counsel in the succeeding two weeks, the principals and the attorneys have recognized at least that joint representation, if continued, would quite likely expose one or the other to conflicts which could not be resolved and would delay the proceedings if not create other problems from which they could not extricate themselves.

(4) The principals have now voluntarily, intelligently and thus legally waived and surrendered, in all future proceedings in

these and any related matters, the attorney-client privilege heretofore existing as stated in their written letters.

(5) With regard to any and all circumstances which occur in any future proceedings in these and any related matters which have been expressly pointed out or suggested to the principals by the Court, as well as any other circumstances reasonably foreseeable as a result of the hearing and discussions with counsel thereafter, the three principals have voluntarily, intelligently and thus legally waived and surrendered their constitutional right to "effective counsel unfettered by conflicting interests" among these parties; and they have deliberately chosen to proceed with the attorneys designated despite the conflicts."

Defendants have no exception to the finding of fact or relevant law applied to facts by the district court. On or about January 14, 1983, the State applied to the Second Circuit Court of the State of Louisiana for Writs of Certiorari or Review, to review the district court's ruling on the conflict of interest question, and have the undersigned

counsel disqualified. On January 27, 1983, the Second Circuit Court of Appeal issued an order granting the writ for the limited purposes of requiring the district court to hold a hearing at which the defendants are to be placed under oath and subjected to cross-examination as to their understanding of their "purported waivers."

Petitioners immediately notified the Court of Appeal for the Second Circuit of their intention to apply to the Supreme Court of Louisiana for writs of certiorari or review. Following timely writ application, the Supreme Court of the State of Louisiana denied certiorari without a written opinion. See: State of Louisiana v. Wandall W. Coody and Allen Brown, No. 83-KK-0576.

ARGUMENT

A. The Constitutional Standard

It is well settled that representation

by counsel in a criminal proceeding is "fundamental and essential to a fair trial." Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, (1963). As well, "it has been long recognized that the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 770, 90 S.Ct. 1441, (1970). Earlier precedents of this Court have consistently recognized that the assistance of counsel is critical, "not only to equalize the sides in an adversary criminal process, but also to give substance to other constitutional and procedural protections afforded criminal defendants." Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, (1979),(Brennan, Jr., dissenting at 377). Thus, the Sixth Amendment right to "adequate legal assistance" applies -- without "distinction between retained and appointed counsel" -- at all state-conducted "trials

at which persons .... face incarceration." Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, (1980).

The right to effective assistance of counsel includes the right to counsel "untrammeled and unimpaired" by the representation of "conflicting interests." Holloway v. Arkansas, 435 U.S. 475, 482, 98 S.Ct. 1173, (1978). This Court has unequivocally stated that "....a lawyer forced to represent co-defendants whose interests conflict cannot provide the adequate legal assistance required by the Sixth Amendment." Cuyler v. Sullivan, supra., 446 U.S. at 345. But, the joint representation of co-defendant "is not per se violative of constitutional guarantees of effective assistance of counsel." Holloway v. Arkansas, supra, 435 U.S. at 482. In many instances "joint representation is a means of insuring against reciprocal recrimination," for a "common

defense often gives strength against a common attack." Glasser v. United States, 315 U.S. 60, 92, 62 S.Ct. 457, (1942), (Frankfurther, J., dissenting).

B. Waiver Standards

A defendant may dispense with constitutional guarantees, so long as his waiver represents "an intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, (1938). Just as an accused may completely forego all of his constitutional rights by pleading guilty and confessing guilt, Boykin v. Alabama, 395 U.S. 239, 89 S.Ct. 1709, (1969), or waive his right to counsel in favor of self-representation, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, (1975), he is free to make personal decisions bearing upon the presentation of his best defense. All our Constitution requires is that

waivers of fundamental rights be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, (1970). To hold otherwise would transform the procedural safeguards of the Bill of Rights into mechanical rigidities and "discriminate against one right in favor of another when the Constitution does not so require." United States v. Garcia, 517 F.2d 272, 276, (5th Cir. 1975). Of course, this is not to dispute that "....a strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, (1973).

C. Federal Constitutional Considerations

The lower federal courts have consistently held that the right of the criminal defendant to participate in decisions critical to his defense allows him to execute a knowing and informed waiver of the right to conflict-free representation.

> "...the right to manage one's own defense is at the heart of the Sixth Amendment guarantees... the client may waive his Sixth Amendment rights to effective assistance of counsel and to confrontation of witnesses, just as he may knowingly and intelligently waive any constitutional right." United States v. Armedo-Sarmiento, 524 F.2d 591, (2nd Cir. 1975).

The Fifth Circuit has repeatedly held that "...a defendant may choose to be represented by counsel with possible or real conflicts." United States v. Villarreal, 554 F.2d 235, (5th Cir. 1977). In United States v. Garcia, supra, the Fifth Circuit ascertained the correct standard for the waiver of the right to

conflict-free representation and further provided the proper degree of judicial participation in the decision as follows:

> "The Bill of Rights is a catalog of limitations on government, ensuring that certain inalienable rights are not to be infringed by the sovereign. But the prohibitions of the first ten constitutional amendments, while designed for the protection of individuals, were not intended as mandatory proscriptions on them. Individuals are free to waive the constitutional protections otherwise afforded them, regardless of their motivation, so long as the waiver is voluntary, knowing and intelligent. To be sure, federal courts should refrain from casually finding waiver of vital federal constitutional guarantees such as the right to counsel, but the government's suggestion on appeal that it is impossible as a matter of law to waive the Sixth Amendment right to effective assistance of counsel in circumstances involving serious conflicts of interest is novel and unfounded. If defendants may dispense with the right to be represented by counsel altogether, it would seem that they may waive the right to have their retained counsel free from conflicts of interest.

"In accordance with the foregoing principles, we instruct the district court to follow a procedure akin to that promulgated in F. R. Crim P. 11 whereby a defendant's voluntariness and knowledge of the consequences of a guilty plea will be manifest on the face of the record. As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the Court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections." United States v. Garcia, supra, 517 F.2d at 276-278, (citations omitted).

In United States v. Alvarez, 580 F.2d 1251, 1260, (5th Cir. 1978), the Fifth Circuit reaffirmed Garcia by allowing the waiver of the right to conflict-free

representation when the accused had "knowingly and intelligently made the decision to proceed with the challenged counsel." It follows that "when a defendant opposes disqualification of his or her own attorney, the district court must take the necessary steps to impart to the defendant a full understanding of the consequences of the decision and to assure that the defendant's ultimate choice is honored." United States v. Mahar, 550 F.2d 1005, 1010, (5th Cir. 1977) (emphasis added). Pursuant to Fifth Circuit jurisprudence, nothing may impede the free choice of the defendant, so long as he is: "(1) Aware that a conflict of interest existed; (2) realized the consequences to his defense that continuing with counsel under the onus of a conflict could have; and, (3) was aware of his right to obtain other counsel." Zuck v. State of Alabama, 588 F.2d 436 (5th Cir. 1979).

It is worth noting that the right of the defendant to exercise his free and intelligent choice is inviolable, unless the actual conflict of interest is perceived as involving the public perception of the attorney and the legal system rather than the attorney's effective representation of his client. United States v. Hobson, 672 F.2d 825, (11th Cir. 1982), (attorney was alleged to have been involved in the criminal activity under prosecution). No such circumstances are remotely alleged in the instant case and the decision of the defendants "to retain counsel of [their] choice is strong and deserves great respect." United States v. Hobson, supra, 672 F.2d at 828.

D. The Defendants' Right to Free Choice

The question presented does not involve the right to counsel, but instead

the right of the defendant to exercise his free and unconstrained choice in choosing how to exercise his basic constitutional rights. Defendants have exercised free choice in obedience to the dictates of self interest and the promptings of conscience. To deny the defendants free choice in these circumstances "is to impair the worth of great constitutional safeguards by treating them as empty verbalisms." Adams v. United States ex rel McCann, 317 U.S. 269, 280, 63 S.Ct. 236, (1942). Considering the vast constitutional guarantees designed to enable the accused to present his defense, "to deny him in the exercise of his free choice the right to dispense with some of these safeguards....and to base such denial on an arbitrary rule.... is to imprison a man in his privileges and call it the Constitution." Id.,

317 U.S. at 280.

This Court must be mindful that "procedural instruments are means for achieving the rational ends of justice." Id., 317 U.S. at 273. To allow a defendant to waive his right to conflict-free representation in order to proceed with counsel of his choice is "....neither obnoxious to humane standards for the administration of justice as these have been written into the Constitution, nor violative of the rights of any person accused of crime who is capable of weighing his own best interests..." Id., 317 U.S. at 280.

It is noteworthy that heretofore, the District Attorney for the Fourth Judicial District Court has not been noticeably preoccupied with preserving or protecting the constitutional rights of those accused of crime. (The State acknowledged that it had not previously filed such a motion.)

In the instant case, the prosecuting authority has attempted to subvert the essence of the basic right to counsel in order to disrupt the orderly process of justice. Defendants respectfully urge that the fundamental right to counsel guaranteed by State and Federal Constitution is not one subject to the concurrence of the District Attorney.

CONCLUSION

The ruling of the trial court is an enlightened and well reasoned opinion which promotes "judicial restraint" and resists "meddling" with those matters properly within the scope of the attorney-client privilege. To the contrary, the rather cryptic opinion of the Court of Appeal for the Second Circuit is a clear invitation for the courts to involve themselves in matters which are within the protected

domain of the attorney and his client. Further judicial inquiry will serve no useful purpose, as petitioners have participated in a hearing conforming to Garcia and its progeny, and waived their right to conflict-free representation. Considering such, the office of the District Attorney for the Fourth Judicial District should not be allowed to obstruct the rights of the defendants to free and unconstrained choice.

For the aforestated reasons, this Honorable Court should grant a writ of certiorari to review the decision of the Court of Appeal for the Second Circuit.

Respectfully submitted,

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WANDALL W. COODY

CERTIFICATE

I hereby certify that I have furnished an exact copy of the foregoing Petition for Writ of Certiorari to Honorable Allen Harvey, Assistant District Attorney, Morehouse Parish, by placing same in the U.S. Mail, postage prepaid, on this _____ day of June, 1983.

_____
OF COUNSEL

SWORN TO AND SUBSCRIBED before me, the undersigned Notary, on this _____ day of June, 1983.

_____
NOTARY PUBLIC

STATE OF LOUISIANA * PARISH OF MOREHOUSE *

FOURTH DISTRICT COURT

STATE OF LOUISIANA FILED: _____

VERSUS NOS. 82-2035A, 82-2036A,
82-2037A, 82-2038A, 82-2039A

WANDALL W. COODY

AND

STATE OF LOUISIANA

VERSUS NO. 81-2865A

ALLEN BROWN DEPUTY CLK. OF CT.

RULINGS ON CONFLICTS OF INTEREST

Defendant Coody, Sheriff of Morehouse Parish, is charged in three separate bills with malfeasance in office having to do with allegedly requiring inmates of the parish jail to perform work on a privately owned building. An additional bill charges injuring public records by allegedly entering on office financial records as expenses of the office items of cost incurred by the sheriff for the

work on that private building. The fifth bill charges theft in regard to alleged use of employee salary raises to pay personal obligations. There remain at this time unresolved charges against Sheriff Coody of malfeasance and/or injuring public records arising out of the alleged alteration of the arrest book for the benefit of two brothers named Reese who had been arrested by deputies and "booked" for theft. The latter charges were earlier transferred to Rapides Parish for trial pursuant to ruling on a motion for change of venue.

Defendant Brown is also separately charged in Number 81-1865A for his alleged part in the arrest book episode involving the Reese brothers, which occurred while he was serving as chief criminal deputy under Sheriff Coody. The five charges captioned above were

filed against Sheriff Coody long after the bills against him and Brown were filed in the Reese affairs. No motion for change of venue has been filed in the instant Coody cases or in the Brown case.

From proceedings and filings of record in the six captioned cases and the transferred case, the following events and facts are summarized in roughly but perhaps not precisely chronological order of occurrence:

When information surfaced concerning the crash of a small plane in Morehouse Parish and alleged activities of Deputy Brown with respect thereto, the District Attorney began an investigation. Brown employed Mr. Paul Kidd of Monroe as his attorney. When investigation attention was turned to the Reese matter and involved both Coody and Brown, Kidd continued to represent Brown; and Coody

employed Mr. O. N. Hamilton of Oak Grove as his attorney. Both officers were charged in the Reese affair, in separate bills.

By the time the motion for change of venue was heard in the earlier Coody case, Brown had been discharged from his employment by Coody and Harvey High, the chief civil deputy, was ultimately made acting chief criminal deputy. Nothing in the way of court activity occurred in the Brown case; but in a separate bench trial the Reese brothers were convicted of theft charges arising out of the original arrest which led to the first charges against Coody and the instant charge against Brown.

Sheriff Coody then engaged the law firm of Mr. Camille Gravel in Alexandria to represent him in the case transferred to Rapides Parish. It is not clear from

the instant records whether Hamilton was dismissed or remained temporarily as co-counsel with Gravel. In any event, while the original charges against Coody were being handled in Rapides Parish, the district attorney's office began investigating information concerning the work on the private building in Bonita in the northern part of Morehouse Parish.

Deputy Brown, who was then working elsewhere, gave a recorded statement to the district attorney's investigator, with the consent and approval of his attorney, Kidd, who was present during at least part of the interrogation. Deputy High was not then represented by counsel, but he also gave a recorded statement to an investigator for the district attorney after having received Miranda warnings and having waived constitutional rights against self-incrimination and to counsel.

Both these statements were to some extent self-incriminating and also contained facts which, if adduced in court, could be considered to incriminate Sheriff Coody in regard to all of the charges against him. In addition, Brown's statement was somewhat incriminating of High, and vice versa.

Thereafter, Sheriff Coody dismissed the attorneys previously representing him and employed Kidd as his counsel. Kidd filed pleadings which were heard and ruled on in Rapides Parish and which are on appeal. Thereafter, the five captioned bills were filed against Coody. Kidd remained enrolled as counsel for Brown and has to date represented Coody in these five cases. High also engaged Kidd, although no charges have yet been filed against him.

The state moved for and scheduled preliminary examinations in the instant Coody cases and issued subpoenas for Brown and High as witnesses. The latter two, through

Kidd, filed motions to quash the subpoenas, contending that forcing them to testify would violate the attorney-client privilege existing between them and Kidd (presumably by requiring them to reveal information discussed with their attorney or by subjecting them to cross-examination by their own counsel). Simultaneously, Kidd filed for Coody motions to quash the scheduled preliminary examinations on the ground that the state would thereby be permitted to engage in impermissible discovery by forcing Brown and High to testify on matters discussed among all defendants with their counsel.

On the date the preliminary examinations were to be heard, the state filed in each of the captioned cases a pleading called "Request of Court to Insure Defendant's Constitutional Rights." Attached to one or the other of these pleadings were what purported to be

transcriptions of the recorded statements of Brown and High given earlier to the district attorney's staff. The state took the position that there exist now obvious conflicts of interest onthe part of the attorneys representing the two defendants and High (a witness and potential defendant), as well as future situations which would bring the conflicts into focus, all to the detriment of one or all of the defendants. The Court was requested to "take all appropriate measures to insure defendants' constitutional rights and cure any appellate prejudice, if necessary or possible."

These filings were made so late that counsel for defendants were not prepared to proceed on that date, and neither the state nor the Court was prepared to suggest or determine the nature and scope of any hearing necessary. It was, however, obvious that if there were

any avoidable danger to defendants' rights, those matters should be resolved before any other steps were taken or hearings held. The Court therefore re-scheduled all the pending matters for hearing the following week on December 1.

Prior to that hearing, Kidd filed on behalf of Coody a motion to quash all the charges on the ground of prosecutorial misconduct. In that motion and/or in the brief in support thereof, Kidd referred to a number of meetings and agreements with the prosecutor and otherwise revealed discussions and activities involving all three of the persons represented.

When the matters came on for hearing on December 1, the Court called up as the first order of business the filings concerning alleged conflicts of interest. To that point, some of the pleadings filed had been signed by Kidd and some by Mr.

Jerry Jones, who has or has had an association of unrevealed nature and scope with Kidd. The Court was assured by both attorneys and the three principals that Kidd and Jones were co-counsel or fully associated in the representation of all three principals and that there was no distinction in the representation by each attorney.

The Court then instructed and inquired of the three principals, both separately and jointly, as to several constitutional rights and factors creating conflicts of interests. The state declared its intention to file charges against High and possibly to offer immunity to one or more of the principals so as to require their testimony. Upon determining that some of the matters covered had not been fully considered and discussed (including separate and specific arrangements for

fees), the Court instructed the three principals to file with the Clerk no later than December 15 separate written statements in which each stated for the record whether or not he elected to proceed with the same counsel and, if so, an assurance that he has a specific and separate agreement concerning fee with the attorneys.

On December 15, there were left at this Court's chambers five letters which were forwarded by the Court to the Clerk for filing, including: (1) a cover letter signed by Kidd addressed to the Court; (2) one signed by Brown, addressed to Kidd; (3) one signed by Coody addressed to Jones; (4) one signed by High addressed to Kidd; and (5) one signed by High addressed to Jones. Read together, these letters reveal: that Kidd has withdrawn (or will do so) as counsel for Brown

and High and will represent Coody; that Jones has withdrawn (or will do so) as counsel for Coody and High and will represent Brown; that High will engage separate counsel; that Coody waives the attorney-client privilege with respect to Jones as his former counsel; that Brown waives the attorney-client privilege with respect to Kidd as his former counsel; and that High waives his attorney-client privilege with respect to both Kidd and Jones as his former attorneys. The letters do not explain the relationship (if any) which exists between Kidd and Jones.[1]

---

[1] This Court does not know, nor does this record reveal, the precise nature of the relationship. The Court only knows that at times in the past, Jones has occupied office space in Kidd's building and that on numerous occasions Jones has appeared in Kidd's behalf in regard to chambers orders, pre-trial conferences and in the courtroom. The only inference drawn from these facts is that in the past there has been an apparent identity of

Although the two attorneys are now at least nominally separated and each of the three participants has waived the attorney-client privilege arising out of past representations, the legal issues presented are not entirely moot. Not only is the appearance of past association between Kidd and Jones--at least in their previous joint representation of all three principals--still unresolved, but future developments may surface circumstances which bring past conflicts of interest into focus. Accordingly, the Court must now decide the issues presented.

(Footnote No. 1 Continued:)

representation or a close and frequent association, both in the instant cases and in others. In planning the civil docket, the Court just recently reviewed a record filed in Ouachita Parish wherein a pleading is signed: "Kidd & Jones, Attorneys at Law, No. 1 Wood Street, Monroe, Louisiana 71210, by Jerry L. Jones." That pleading was filed October 5, 1982.

THE LAW

The Sixth Amendment to the Constitution of the United States guarantees to any person accused of crime the right to counsel. This same guarantee is set forth in Article 1, Section 13 of the Louisiana Constitution. This concept originated, no doubt, in the desire to force government to permit the appearance of counsel for an accused, since history taught that the frequent approach of despots was to ban the presence of attorneys or other spokesmen for the accused. However, the right to counsel has been expanded substantially by judicial interpretations and legislation. The right is now considered to contemplate not only the assistance vel non of an attorney, but one whose best efforts and exclusive dedication to his client's interests is unfettered by divided loyalty

or conflicting or adverse interests. For example, Rule 44 of the Federal Rules of Criminal Procedure speaks of the "right to effective assistance of counsel, including separate representation" (emphasis supplied). That rule enjoins the federal trial court (pre-trial, apparently) to "take such measures as may be appropriate" to protect each person's "right to counsel" when two or more are jointly charged or joined for trial and are represented by the same attorney or by attorneys "who are associated in the practice of law..."

Following that mandate, federal judges have held hearings for the purpose of attempting to determine whether conflicts of interest exist or may exist, or have sought to avoid conflicts or have found waivers. See, for example, United States v. Davenport, 478 F.2d 203; United States v. Partin, 601 F.2d 1000; United States v.

Garafola, 428 F.Supp. 620. The judge in the Garafola case went so far as to prepare a form for execution by attorneys jointly representing two or more defendants in a case, and ordered one defendant to retain another attorney after his co-defendant voluntarily decided to do so, thus "deposing" the original attorney from all representation.

The American Bar Association, purporting to speak for its tens of thousands of members, has adopted several documents which address the professional conduct and responsibilities of attorneys and deal with actual and potential conflicts of interest between clients. Its Code of Professional Responsibility enjoins an attorney to weigh carefully the possibility of divided loyalty or impaired judgment in potent conflict situations and to "resolve all doubts against the propriety of

the representation." Its Standards Relating to The Defense Function speak of the gravity of potential conflicts with multiple representations, urge "careful investigation" by the attorney, and recommend that such representation not be undertaken except in unusual situations when no conflict is likely to develop and when informed consent of all clients is obtained.

Louisiana has no such statute as federal Rule 44, nor are there any pre-trial guidelines provided by statute or appellate decision. However, our state does have its own Code of Professional Conduct for attorneys which speak with the force of law in Ethical Consideration 5-14 and Disciplinary Rule 5-105 on the subject of multiple representation. Moreover, our Supreme Court has reversed criminal convictions because of conflicts of

interest arising from multiple representation. See, State v. Franklin, 400 So.2d 616; State v. Ross, 410 So.2d 1388; State v. Rowe, 416 So.2d 87. In State v. Bosworth, 415 So.2d 912, a reversal sought on that ground was refused because the Supreme Court concluded that no actual conflict existed despite multiple representation. The attorney-client privilege loomed large in all these cases.

The three reversals occurred in cases in which attorneys were appointed to represent indigent co-defendants, wherein one pleaded guilty and testified at the trial of the other. The attorney-client privilege of the witness-defendant was not waived, and in two of the cases, the attorney sought to withdraw as counsel for the remaining defendant on the ground of conflicting interests. In the third case, no motion to withdraw was made, nor

was any objection to representation asserted until post-conviction relief was sought. In the latter case (State v. Ross), the majority of the Supreme Court found an actual conflict of interest despite the absence of such plea pre-trial or at trial by either the convicted defendant or his counsel.

The basic constitutional guarantee of effective counsel unfettered by conflicting representation is clearly viable and not infrequently urged in Louisiana, as are strong ethical and disciplinary rules governing attorneys in such circumstances; but we have no pre-trial procedures for avoiding the results.[2] Even though none of the

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[2] In State v. Franklin, the author of the Supreme Court's majority opinion suggested the possibility of barring joint representation in every case. In State v. Ross, the majority opinion strongly implies that even without any such issue having been raised, the trial judge should have

principals in these matters is jointly charged with any of the others and there is no indication of joint trial, the prospect of one or more being called to be a prosecution witness against another is not only most likely but has been forecast by subpoenas issued for the preliminary examinations in the Coody case and by the state's declaration of future intentions. Moreover, despite the waiver of attorney-client privileges by all principals and the fact that each now has separated himself from joint representation by the same attorneys, there remains the effect or possible results of the previous joint representation during which it was clear that if conflicts did not

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(Footnote No. 2 continued:)

taken "steps" to ascertain whether conflicts existed. Yet, all courts, both federal and state, continue to hold that joint or multiple representation is not per se a violation of defendants' rights.

then exist, they were virtually certain to appear. The attorneys themselves have now belatedly recognized this fact; and there also remains the suggestion of some kind of association or relationship between Kidd and Jones in their general practices--at least in the recent past.

CONCLUSIONS

Clearly, all potential problems created by the joint representation have not been completely resolved. Yet, the principals have been thoroughly informed of their rights, as well as potential developments; and they have made intentional choices as to retained counsel. Unlike those circumstances in which the government is providing free counsel by appointment, when the accused has no real choice in the selection of counsel, this Court is here dealing not only with legal theory regarding rights of accused

persons, but with their free and informed personal decisions in choosing retained attorneys.

The present circumstances therefore oblige the Court to seek and to draw an extremely fine line between the performance of serious judicial responsibilities and judicial meddling--between judicial "activism" and judicial restraint. It may as well be said at the outset that legally, philosophically, intellectually and by nature, this Court is "for" restraint and "against" meddling.

Although not expressly stated, the state seems rather clearly to be contending that the only ruling which can completely eliminate the effects of the joint representation and avoid "appellate prejudice" (meaning reversal on appeal in the event of convictions) is an order requiring all principals to discharge

both Kidd and Jones and employ new, totally separate counsel. In the context presented, this Court must decline the implied invitation to meddle with the free choice of the principals.

Having advised the principals fully, the Court now accepts their assertions in open Court and their written findings at face value. From those representations by them, the Court holds that:

(1) Heretofore, there have existed substantial differences between the three principals as to both factual accounts and subjective analysis of motivation and intent (if not culpability), as well as disagreements as to responsibilities and authority. Therefore, there have existed both actual and potential conflicts of interest among them, and their

joint counsel have been attempting to represent conflicting interests.

(2) After participating in the discussions with counsel before the hearing on December 1 (as represented to the Court during the hearing), they sought to resolve those conflicts by agreement and common approach under the guidance of joint counsel and apparently believed that they had achieved their purpose.

(3) However, after being interrogated and instructed by the Court in the hearing, and after conferring with counsel in the succeeding two weeks, the principals and the attorneys have recognized <u>at least</u> that joint representation, if continued, would quite likely expose one or the other to conflicts which could not be

resolved and would delay the proceedings if not create other problems from which they could not extricate themselves.

(4) The principals have now voluntarily, intelligently and thus legally waived and surrendered, in all future proceedings in these and any related matters, the attorney-client privilege heretofore existing as stated in their written letters.

(5) With regard to any and all circumstances which occur in any future proceedings in these and any related matters which have been expressly pointed out or suggested to the principals by the Court, as well as any other circumstances reasonably foreseeable as a result of the hearing and

discussions with counsel thereafter, the three principals have voluntarily, intelligently and thus legally waived and surrendered their constitutional right to "effective counsel unfettered by conflicting interests" among these parties; and they have deliberately chosen to proceed with the attorneys designated despite the conflicts.

These and related proceedings will now proceed pursuant to these conclusions and rulings.

S/
ROBERT T. FARR, JUDGE

COURT OF APPEAL, SECOND CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA NO. 15,382-KW

vs. FILED: January 17, 1983 pm 1-14-83

WANDALL W. COODY
& ALAN BROWN

On application of the State of Louisiana

for writs of certiorari and review
82-2035A; 82-2039A
in No. 82-2865A on the docket of the

4th Judicial District Court, Parish of

Morehouse, State of Louisiana, Hon.

Robert T. Farr, Judge.

Allen Harvey Assistant District Atty.	Counsel for: Plaintiff-Applicant
Paul Henry Kidd	Counsel for: Defendant-Respondent
Jerry Jones	Counsel for: Defendant-Respondent

BEFORE PRICE, FRED W. JONES AND SEXTON, JJ.

WRIT GRANTED for the limited purpose of directing the trial judge to hold a hearing, conducted in a manner considered appropriate by him, at which the State and the defendants shall be afforded an opportunity to present evidence through

witnesses, who shall be placed under oath and shall be subject to cross-examination, relating to the purported waivers by the defendants of their right to counsel free from any conflict of interest and of their attorney-client privilege, and dealing specifically with, but not limited to, the following questions:

(1) The nature of any working relationship between Attorney Paul Kidd and Attorney Jerry Jones pertaining to the practice of law, and the knowledge of defendants on that subject, and

(2) The understanding of the defendants with reference to the practical implications of their purported waivers.

After considering the evidence presented at this hearing, the trial judge's ruling shall be guided by the legal principles set forth in State v. Rowe, 416 So.2d 87 (La. 1982); State v. Franklin, 400 So.2d 616 (La. 1981); and U.S. v. Partin, 601 F.2d 1000 (C.A. 9th, 1979).

Shreveport, Louisiana, this 27th day of January, 1983.

S/ Fred J. S/ O.E.P. S/ F.C.S.

Filed January 27, 1983

S/ Bob W. Schulman
CLERK

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA NO. 83-KK-0576

VS

WANDALL W. COODY

AND

ALLEN BROWN

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In Re: Wandall W. Coody and Allen Brown, applying for Writ of Certiorari or Review, to the Fourth Judicial District Court, Nos. 82-2035A, 82-2039A, and 82-2865A; Parish of Morehouse, Second Circuit Court of Appeal, No. 15-382-KW.

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April 15, 1983

Denied. JCW

JAD

PFC

WFM

JLD

FAB

HTL

Supreme Court of Louisiana
April 15, 1983.

S/ Frans J. Labranche, Jr.
Clerk of Court for the Court